

ROBERT C. MARSLETTE, JR.,)
)
 Plaintiff,)
)
 v.) Civil Action No. 00-509-SLR
)
 DAN GLICKMAN, or his successor, in)
 his capacity as Secretary of the)
 U.S. Department of Agriculture,)
)
 Defendant.)

Colm F. Connolly, United States Attorney and Patricia C. Hannigan, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Defendant.

Dated: April 28, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Robert C. Marslette, Jr. filed this action against defendant Dan Glickman, in his capacity as Secretary of the United States Department of Agriculture ("USDA"), on May 22, 2000. (D.I. 1) Plaintiff asserts a civil rights claim against defendant and seeks judicial review, pursuant to 5 U.S.C. §706(2)(A), of a decision by the USDA denying his discrimination claims against USDA employees. (D.I. 14) Currently before the court is plaintiff's motion for partial summary judgment (D.I. 36) and defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 12(b)(6). (D.I. 38) Because the parties presented matters outside the pleadings, the court will review the motion to dismiss as a motion for summary judgment. For the reasons that follow, the court shall grant defendant's motion for summary judgment and deny plaintiff's motion.

II. BACKGROUND

Congress has established multiple programs to assist farmers in conserving farm lands. The Emergency Conservation Program (ECP) provides financial assistance to farmers for the restoration of farmlands on which normal farming operations have been impeded by natural disasters. Conservation problems that existed prior to a disaster are not eligible.

In 1993, plaintiff applied for cost-share assistance to repair waterways under the ECP. (D.I. 29 at A75) The local Farm Services Agency (FSA) initially approved plaintiff's request for assistance. (Id.) In May 1994, the FSA determined that plaintiff's property was not eligible for ECP, and denied enrollment.¹ (Id.) The FSA recommended other conservation practices and permitted plaintiff to participate in the Conservation Reserve Program (CRP) and the Agricultural Conservation Program (ACP), which are alternative cost-share assistance programs. (Id.)

Plaintiff received payments for participation in CRP and ACP from the local FSA, however, they were less than the amount he expected. (Id. at A86) On May 5, 1995, plaintiff requested that the local FSA review their cost determinations. (Id.) On May 18, 1995, the local FSA met with plaintiff to discuss his appeal of the ACP and CRP cost-shares. (Id. at A53) The FSA determined that plaintiff had been paid the correct amount of cost-share assistance. (Id.) This determination was upheld on appeal to the Acting Missouri State Consolidated FSA. (Id. at A76)

¹An initial site inspection completed on January 21, 1994 allowed for a tentative approval of plaintiff's land into ECP. Due to lack of funds, plaintiff was not guaranteed the cost-share assistance. Upon receipt of additional funds, a new site inspection was completed, which revealed that the findings from the initial inspection were incorrect. Inspection reports showed that there was not flood damage of a magnitude to qualify under the ECP program. (A0201)

Plaintiff appealed this decision to the National Appeals Division ("NAD"). On September 14 and October 4, 1995, the NAD Hearing Officer conducted an evidentiary hearing. (D.I. 33 at C80) In consideration of the entire record, the Hearing Officer concluded: (1) the Agency did not document how the cost-share rate was determined; (2) the Agency did not show that the calculations used to determine the cost-share assistance were correct; and (3) figures were changed on documents after plaintiff signed them, which is considered a material defect in the servicing of the application. (Id. at C82, 83) On November 6, 1995, the Hearing Officer reversed the Agency's decision and instructed the FSA to pay additional funds to plaintiff. (D.I. 30 at A471-475) The local FSA recalculated the payments and paid plaintiff \$667.00 additional cost-shares on December 18, 1995. (D.I. 29 at A213)

On January 10, 1996, plaintiff filed a claim with the USDA alleging that the FSA discriminated against him on the basis of disability in considering his application to enroll a parcel of his real property in the CRP program.² (D.I. 31 at B201-204) The Office of Civil Rights Enforcement (OCR) processed the complaint and requested an investigation. (Id. at B153) Both a preliminary inquiry conducted by the Missouri State Civil Rights Coordinator

²Plaintiff also filed a direct appeal of defendant's denial of benefits under the CRP, Marslette v. Glickman, 00-816-SLR, which is currently on appeal to the 3rd Circuit Court of Appeals.

and an investigation performed by an external reviewer concluded that discrimination had not occurred. (Id. at B199, B307). On March 3, 1999, plaintiff requested a hearing before an Administrative Law Judge (ALJ) under the provisions of Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act. (D.I. 34 at D11) The OCR filed a position statement stating that plaintiff was not eligible for a hearing under § 741 because the discrimination complaint was based upon the FSA's handling of a CRP application, which is a program not covered under § 741. (Id. at D25) The ALJ dismissed the complaint for lack of jurisdiction. (Id. at D15) On October 16, 1999, plaintiff requested the USDA review the ALJ's determination. (Id. at D26) On December 22, 1999, the USDA adopted the ALJ's determination as its final determination. (Id. at D27) Plaintiff has initiated the current action for review of the final USDA determination.

III. STANDARD OF REVIEW

Judicial review of a decision made by the Director of the NAD is governed by the Administrative Procedures Act ("APA"). See Lane v. United States Department of Agriculture, 120 F.3d 106, 108-09 (8th Cir. 1997). The APA states that an agency's decision, including its action, findings and conclusions, should not be overturned unless it is unsupported by substantial evidence, or if it is arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law. See 5 U.S.C. § 706(2); United States v. Snoring Relief Labs Inc., 210 F.3d 1081, 1085 (9th Cir. 2000). The scope of review is a narrow one and the court should not substitute its judgment for that of the agency. Motor Vehicle Mfrs. Assn. v. State Farm Mutual, 463 U.S. 29, 43 (1983).

Before the court are the parties' cross-motions for summary judgment. (D.I. 16, 19). A party is entitled to summary judgment only when the court concludes "that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no material issue of fact is in dispute. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). Once the moving party has carried its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). "Facts that could alter the outcome are 'material', and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assur. Co., 57 F.3d 300, 302 n.1 (3rd Cir. 1995). If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the

burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of some evidence in support of the party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that factual issue. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986). The court, however, must "view all the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3rd Cir. 1995); Pacitti v. Macy's, 193 F.3d 766, 772 (3rd Cir. 1999).

IV. DISCUSSION

Plaintiff contends that defendant's final determination violates the APA, 5 U.S.C. §706(2)(A), in that it is without observance of procedure required by law. (D.I. 14) His primary contention is that defendant failed to provide a hearing on the record, as required by § 741(b)(1). (Id.)

The applicable statutory language governing eligibility for consideration under § 741 provides:

- [A] complaint must:
 - 1. be a non-employment complaint;
 - 2. have been filed prior to July 1, 1997;
 - 3. have alleged discrimination by USDA occurring between January 1, 1981 and December 31, 1996;
 - 4. alleging a violation of:
 - (a) the Equal Credit Opportunity Act (ECOA) in the administration of a:

- i. farm ownership loan
 - ii. farm operating loan
 - iii. emergency loan
 - iv. rural housing loan; or
- (b) discrimination in the administration of a commodity Program or disaster assistance program.

Id.

In addition to the due process claim, plaintiff also alleges a civil rights claim against defendant. (D.I. 14) Specifically, he argues that the FSA discriminated against him on the basis of disability in considering his application to enroll in the CRP.

(Id.)

Defendant contends that the determination at issue is proper. (D.I. 42) Plaintiff's complaint simply did not meet the fourth prong of the eligibility requirements of § 741, as plaintiff alleges discrimination during the administration of CRP, a program that is not covered under § 741. (Id.) Likewise, defendant contends that plaintiff has failed to make a prima facie showing of discrimination, as he has presented no evidence in support of his protected status as disabled, or in support of his allegation of discrimination on that basis.

A. Defendant's Denial of Plaintiff's Request for an Administrative Hearing Was Proper

Plaintiff challenges defendant's final determination that he was ineligible to request a hearing before an ALJ. (D.I. 41) He claims that his civil rights complaint arises from defendant's failure to award him compensation for costs for repairing flood

damage to his farm. (Id.) He argues that § 741 requires a hearing on the record because his complaints pertain to the administration of a disaster assistance program.

Plaintiff's allegations are not supported by the record. In his initial discrimination complaint filed with the USDA, plaintiff alleged discriminatory acts regarding the administration of CRP and ACP enrollment. (D.I. 31 at B201-204) Because these are cost-share assistance programs and not loan, commodity or disaster assistance programs under § 741, a hearing before an ALJ is not required.

Plaintiff incorrectly argues that he was entitled to a § 741 hearing due to his denial of benefits under the ECP, a disaster relief program. The local FSA determined that plaintiff's property was not eligible for ECP because the waterways on the property were not constructed and there was not flood damage of a magnitude to qualify under ECP. (D.I. 29 at A75) The FSA immediately converted plaintiff's ECP application to the ACP. (Id.) All of plaintiff's appeal actions concerned the cost-share percentage, entitlement to additional cost-share assistance under ACP, and handling of the application, not the choice of program. It was not until 1999, when in response to the OCR Position Paper, plaintiff first challenged the conversion from ECP to ACP. (D.I. 34 at D19-21)

Plaintiff has failed to demonstrate that his discrimination complaint arises from the administration of a program that falls within § 741. The court finds no evidence that defendant violated plaintiff's due process by failing to give him a hearing on the record.

B. Plaintiff Fails to Establish a Prima Facie Showing of Discrimination

Plaintiff asserts a civil rights claim against defendant, alleging discrimination by the USDA on the basis of disability under 29 U.S.C. § 794.³ (D.I. 31 at B17) To establish a prima facie case of discrimination, the complainant must show that:

(1) he/she is an individual with a disability within the meaning of the Act; (2) his/her application was made to a program that receives Federal funding; (3) he/she is "otherwise qualified" to participate in the program; (4) he/she was harmed by an agency decision; and (5) the alleged discriminatory action was based on disability. 29 U.S.C. § 794. The Act defines a disabled person as "...any person who has a physical or mental impairment, which substantially limits one or more major life activities, has a

³Plaintiff's initial complaint filed with the USDA alleges discrimination on the basis of disability, however, plaintiff's opening memorandum asserts discrimination because of his status as a disabled retired police officer, an out-of-state resident for purposes of his Missouri property, and a victim of reprisal for complaining about discrimination and other improper conduct by defendant. (D.I. 36) This court's jurisdiction is limited to a review of the agency decision and will not address arguments raised for the first time on appeal.

record of such an impairment, or is regarded as having such an impairment." 7 C.F.R. § 15b.3(i).

Plaintiff's allegations are not supported by the record. While plaintiff states that he is disabled, he has not provided evidence to show he is disabled, as defined by 7 C.F.R. § 15b.3(i).

Likewise, plaintiff fails to establish that the alleged discriminatory action was based on disability. To the contrary, during an June 1996 interview with a Missouri Civil Rights Coordinator, plaintiff stated that he did not believe that he was being discriminated against due to disability, but suggested that his treatment may have been because he was an out-of-state landowner. (D.I. 34 at D30)

Plaintiff makes conclusory allegations regarding discrimination, but he has not provided any evidence to support his claim. Accordingly, because the plaintiff has failed to make a showing of essential elements of his case, the court finds that there exist no genuine issues of material fact regarding plaintiff's claim of discrimination.⁴

VI. CONCLUSION

⁴Because the court finds no evidence of disability nor discrimination on the basis of disability, the issues of whether plaintiff was otherwise qualified to participate in the program and whether he was harmed by an agency decision need not be reached. The issue of whether plaintiff's application was made to a program that receives Federal funding was not in contention.

For the reasons stated above, the court shall grant defendant's motion and deny plaintiff's motion. An appropriate order shall issue.

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Sue L. Robinson
United States District Judge